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No. 94-1244

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In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN W. BEHRENS, PETITIONER

v.

ROBERT J. PELLETIER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the court of appeals correctly employed a one-interlocutory-appeal rule to bar a government official's second interlocutory appeal where the second appeal involved a legally based qualified immunity defense to a claim that was not before the court of appeals at the time of the first appeal.

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INTEREST OF THE UNITED STATES

This case concerns whether a government official is categorically limited to one interlocutory appeal to assert qualified immunity defenses under *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), even where the second appeal concerns a legal issue that was not, and could not have been, considered in the first appeal. Federal employees sued under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), often seek interlocutory review of district court decisions denying them qualified immunity. The United States has a strong interest in pre-

serving its employees' abilities to perform their functions free from meritless litigation. The United States also has a strong interest in ensuring effective deterrence of, and remedies for, unconstitutional conduct by government employees. Both of those interests will be directly affected by the resolution of the issue presented by this case.

STATEMENT

Respondent Robert J. Pelletier, a former bank executive, sued petitioner John W. Behrens, an agent of the Federal Home Loan Bank Board (FHLBB), to challenge actions petitioner took in the course of monitoring compliance with banking regulations in the early years of the federal savings and loan crisis. In 1985, respondent was named managing officer of Pioneer Savings & Loan Association (Pioneer), pending federal regulatory approval of his service in that capacity. When Pioneer sought such approval from the FHLBB, however, petitioner recommended that Pioneer find someone else to serve as managing officer until the completion of an investigation involving respondent's actions as an officer at another savings and loan that had been placed in receivership.

Respondent contends that petitioner's recommendation caused him to be fired by Pioneer, thus depriving him of a constitutionally protected property interest in employment without procedural due process. Respondent also contends that petitioner conspired to deprive him of a constitutionally protected liberty interest in future employment in the banking industry. Petitioner asserts qualified immunity against both those claims. The defense was denied as to the conspiracy claim in an earlier appeal. The issue before this Court is the validity of a rule

preventing petitioner from appealing the denial of qualified immunity as to the job-termination claim.

1. The Federal Home Loan Bank Act of 1932 established the Federal Home Loan Bank system to restore public confidence in thrift institutions and to make sound and economical home mortgage loans more widely available. See 12 U.S.C. 1421-1449. The Act established the FHLBB, an agency of the federal government, and placed it at the head of a new system of twelve regional Home Loan Banks. 12 U.S.C. 1423, 1437(b).[1] Each of the regional Home Loan Banks was owned and controlled by its members, which were the eligible savings institutions within its geographic district, and served primarily as a central reserve credit source for those member institutions. 12 U.S.C. 1424, 1426. In 1934, Congress created the Federal Savings and Loan Insurance Corporation (FSLIC), a separate federal agency chartered to insure deposits at savings institutions. 12 U.S.C. 1725. The FHLBB had authority to regulate the Home Loan Banks, 12 U.S.C. 1432(a), 1437, and their member savings institutions, 12 U.S.C. 1464. The FHLBB also functioned as the operating head of the FSLIC. 12 U.S.C. 1725(a). The FHLBB carried out certain of its functions through individual officers and employees of the regional Home Loan Banks, who, although otherwise private bank employees, were denominated FHLBB and FSLIC "Supervisory Agents" (or, in the case of the Presidents of the Home

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[1] The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, has since abolished both the FHLBB and the FSLIC. This description of the statutory and regulatory scheme thus refers to pre-FIRREA law.

Loan Banks, "Principal Supervisory Agents") and acted for those purposes as agents of the federal government. 12 U.S.C. 1437(a); 12 C.F.R. 500.32, 501.10 (1986).

In 1983, in response to the developing savings and loan crisis, the FHLBB promulgated regulations requiring especially close scrutiny of all new savings institutions (referred to as "de novo" institutions) that applied to the FSLIC for insurance of their accounts. 12 C.F.R. 571.6 (1986); see also 12 C.F.R. 562.1-562.10 (1986). Savings institutions seeking FSLIC insurance could not be approved if their "financial policies or management [were] unsafe," 12 C.F.R. 571.6(b), and could also be rejected if the "character of the management" was questionable, *ibid.*

2. On March 29, 1984, South Coast Savings & Loan Association (South Coast), a de novo institution, received FHLBB approval for insurance of its accounts. Pet. App. 11a. One of the conditions of that approval was that South Coast provide for employment of a qualified full-time executive managing officer, and that "the continuation or succession of competent management will * * * be subject to the Principal Supervisory Agent's approval." *Id.* at 11a-12a & n.2. In early 1985, South Coast was succeeded in interest by Pioneer, another de novo institution, and Pioneer named respondent as its managing officer, subject to FHLBB approval. *Id.* at 12a.

Petitioner, a salaried employee of the Federal Home Loan Bank of San Francisco, served as a designated FHLBB and FSLIC Supervisory Agent in the Eleventh District. Pet. App. 13a n.4. In April, 1986, petitioner took over the South Coast/Pioneer file from another Supervisory Agent. Pioneer had

requested approval of respondent as managing officer, but petitioner informed Pioneer that the FHLBB could not process its request because respondent had previously been employed as a loan officer and head of the Beverly Hills Savings & Loan Association's Major Loan Division, and a FSLIC investigation had disclosed possible wrongdoing at that institution. *Id.* at 13a. By letter dated May 8, 1986, petitioner told Pioneer's board of directors that the FHLBB could not proceed with Pioneer's application until the Beverly Hills investigation was complete. The letter stated:

> This is in response to the application by Pioneer Savings, requesting approval for Mr. Robert Pelletier to become managing officer of the association. We wish to advise you that an inquiry is currently being conducted by the Federal Savings and Loan Insurance Corporation (FSLIC) into the failure of Beverly Hills Savings and Loan Association, and because of Mr. Pelletier's previous employment with that institution this office is unable at this time to proceed with the application until that inquiry is complete. In this regard, we believe it would be appropriate if Mr. Pelletier would step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills savings is complete.
>
> In view of the foregoing, we believe it is imperative that the Board of Directors initiate a search for a new managing officer without delay. We ask that you keep this office advised as to your progress in that regard.

Ibid. The day that Pioneer received that letter, it asked respondent to step down as President and, when he refused, Pioneer fired him. *Id.* at 14a. Respondent has been unable to find similar employment in the savings and loan industry. *Ibid.*

3. On February 23, 1989, respondent filed a complaint in United States District Court for the Central District of California naming petitioner as defendant in two Fifth Amendment *Bivens* claims. First, he alleged that, in sending the May 8, 1986, letter, petitioner denied him his due process right to a hearing regarding allegations of respondent's wrongdoing. Second, he alleged that petitioner violated substantive due process by impairing his property and liberty rights to employment in his chosen profession. Pet. App. 14a; Complaint ¶¶ 29-39 (first and second claims).[2] Petitioner moved to dismiss or, in the alternative, for summary judgment, asserting that the claims were time-barred by a one-year statute of limitations, and that he was entitled to qualified immunity because neither claim was based on clearly established law.[3]

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[2] In claims not at issue here, respondent also sued the Federal Home Loan Bank of San Francisco, the FHLBB and the United States, alleging violations of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the Privacy Act of 1974, 5 U.S.C. 552 *et seq.*, and also presenting common-law tort claims of tortious interference with contract, intentional and negligent infliction of emotional distress, and negligence. He named petitioner as a defendant in the tort claims, but the United States was substituted as defendant under the Westfall Act. See Pet. App. 11a, 33a.

[3] Petitioner also relied on *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988), asserting that the comprehensive regulation of the banking industry was a "special factor" counseling against

The district court applied a one-year statute of limitations and granted the motion to dismiss "to the extent [that the *Bivens*] claims are based on the [May 8, 1986, letter] and/or plaintiff's loss of employment with Pioneer Savings & Loan," but denied the motion "to the extent said claims are based on other alleged subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment." 10/5/89 Order at 2-3. The court commented that, "given the status of discovery herein"—which had not yet taken place—"it is premature for the court to consider [petitioner's] motion for summary judgment," and thus denied it without prejudice. *Id.* at 2, 4. The court's order did not explicitly address the qualified immunity defenses.

4. On March 2, 1990, petitioner took an interlocutory appeal under *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), asserting qualified immunity on the *Bivens* claims to the extent that they were not time-barred. Petitioner contended that, in view of decisions such as *Connelly* v. *Comptroller*, 876 F.2d 1209 (5th Cir. 1989), and *White* v. *OPM*, 787 F.2d 660, 663 (D.C. Cir.), cert. denied, 479 U.S. 885 (1986), respondent had no clearly established liberty interest in pursuing work in his chosen profession, and that the conspiracy claim thus must fail. Behrens 3/2/90 C.A. Br. 42. Petitioner also asserted that his conduct in sending a confidential letter declining to approve respondent for the managing officer position did not

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judicial creation of a *Bivens* remedy in this context. Pet. App. 14a, 19a-20a. The district court rejected that defense, the court of appeals declined to exercise pendent appellate jurisdiction to review it, *id.* at 19a-20a, and it is not relevant here.

violate any clearly established property or liberty interest. *Id.* at 39-40.[4]

On June 29, 1992, the court of appeals affirmed in pertinent part. Pet. App. 10a-33a.[5] The court rejected respondent's contention that the court lacked jurisdiction to entertain an interlocutory appeal from an order denying a motion to dismiss on qualified immunity grounds. *Id.* at 17a. The court observed that a denial of qualified immunity is a final, appealable order under *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), "regardless of whether that denial takes the form of a refusal to grant a defendant's motion to dismiss or a denial of summary judgment." Pet. App. 17a. Because *Mitchell* v. *Forsyth*, 472 U.S. at 526, and *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817 (1982), require that claims of qualified immunity be resolved at the earliest possible stage of the proceedings, the court of appeals concluded that "[a] requirement that official defendants answer wholly meritless claims for relief or adduce facts to refute entirely unsubstantiated

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[4] Petitioner noted that, although the statute of limitations issue was not before the court of appeals, "there is Ninth Circuit precedent casting some doubt on the limitations ruling below." Behrens 3/2/90 C.A. Br. 45 n.18 (citing cases).

[5] The decision was delayed because, after the appeal was submitted, the court of appeals noted that it was unclear from the district court's order whether the district court had ruled on a separate question, also subject to interlocutory appeal, regarding the propriety of the substitution of the United States as defendant in the common-law tort claims. The court of appeals thus initially vacated the submission and remanded to allow the district court to enter an order in that regard. See Br. in Opp. App. 1a-2a. The case was then resubmitted for decision. Pet. App. 16a.

allegations would run counter to the Court's express direction." Pet. App. 17a.

In the course of its opinion, the court of appeals, in dictum, announced a one-appeal rule for qualified immunity cases. Pet. App. 18a-19a. The court observed that routine appeals from denials of qualified immunity at both the motion to dismiss and motion for summary judgment stages would impose on *Bivens* plaintiffs considerable burdens of expense and delay. *Id.* at 18a. Thus, a defendant official

> may not demand repeated appellate consideration of a claim of qualified immunity that the district court has repeatedly rejected. One such interlocutory appeal is all that a government official is entitled to and all that we will entertain. We do not think that a rule limiting defendants to one bite at the apple will be "peculiarly disruptive of effective government."

Id. at 19a (quoting *Harlow*, 457 U.S. at 817). The court observed that a defendant official accordingly may appeal immediately from an order denying a motion to dismiss on qualified immunity grounds only "at his peril," because, if he does so unsuccessfully, he is barred from appealing any later order denying qualified immunity. Pet. App. 19a.

On the merits of the qualified immunity defense, the court of appeals concluded that, in view of the district court's statute of limitations ruling, "the question whether [respondent] had a cognizable liberty or property interest in the particular position that he held at Pioneer is not before us." Pet. App.

21a.[6] The court thus addressed only whether respondent had alleged a violation of a clearly established right to be free from ongoing governmental interference with his pursuit of his chosen livelihood, and held that he had. *Id.* at 21a-24a. The court held that respondent's allegations that several senior-level jobs were offered him, only to be withdrawn when the prospective employers learned of petitioner's May 8, 1986, letter and of respondent's termination from Pioneer, and that he had been unable to secure other employment in the savings and loan and financial institutions industries, were "sufficient to support the claim that [petitioner] violated [respondent's] clearly established right to pursue his chosen profession free from interference by the government." *Id.* at 23a. On September 24, 1993, the panel denied rehearing.

5. On remand to the district court, the parties agreed that the *Bivens* claim earlier dismissed as time-barred could be revived. The parties conducted substantial discovery on both claims. Petitioner then moved for summary judgment on a variety of grounds, including an argument that the revived *Bivens* claim was based on unclear law and therefore barred by qualified immunity. Behrens 3/18/94 D. Ct. Br. 12-15. Petitioner noted that, although the court of appeals had not reached the question on the first appeal, it had signaled the unsettled nature of the law governing the job-termination claim when it stated in dictum

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[6] The court noted, however, that the district court's imposition of a one-year limitations period "appears contrary to the rule established by our holding in *Marshall* v. *Kleppe*, 637 F.2d 1217, 1223-1224 (9th Cir. 1980)," applying a longer statute of limitations to *Bivens* claims. Pet. App. 15a n.6.

that it had "not yet had occasion to consider whether a requirement of regulatory approval suffices to negate entirely the constitutional protection to which a privately employed individual would otherwise be entitled." Behrens 3/18/94 D. Ct. Br. 14; see Pet. App. 21a.

On September 7, 1994, the district court entered an order ruling on a series of pending motions, including the summary judgment motion. Pet. App. 2a-7a. The court held that "[p]laintiff's *Bivens* claims should be reinstated as against defendant Behrens, since the applicable statute of limitations is three, rather than one, year," *id.* at 3a, and that "[m]aterial issues of fact remain as to defendant Behrens on the *Bivens* claims," *id.* at 5a. Once again, the district court did not explicitly address the qualified immunity defense, but effectively denied it by ordering that the "[m]otion by defendant Behrens for summary judgment is denied as to the Bivens claims." *Id.* at 6a.

On October 24, 1994, petitioner filed a notice of appeal, stating his intention to challenge the one-interlocutory appeal rule and to assert qualified immunity. In response to an application by respondent, the district court certified the second interlocutory appeal as frivolous "[i]n light of the 'one appeal' rule." Pet. App. 9a. Respondent moved to dismiss the appeal for want of appellate jurisdiction, and the court of appeals granted the motion based on the one-appeal rule. *Id.* at 1a (citing *Nelson* v. *Silverman*, 999 F.2d 417 (9th Cir. 1993) (applying one-appeal rule to bar second interlocutory qualified immunity appeal)).

SUMMARY OF ARGUMENT

1. But for the one-interlocutory-appeal rule, the court of appeals would have had jurisdiction over the second appeal in this case notwithstanding that the district court's order denying petitioner's motion for summary judgment asserting qualified immunity stated that "material issues of fact remain." This Court thus need not remand for reconsideration in light of *Johnson* v. *Jones*, 115 S. Ct. 2151 (1995). Petitioner sought in his second appeal to assert precisely the kind of "purely legal" qualified immunity defense that *Johnson* held is properly appealable. The district court's order thus mischaracterized the issue as one turning on disputed facts. That mischaracterization is clear from the record, and should not be permitted to defeat an otherwise valid appeal.

2. This Court should reject the court of appeals' categorical one-interlocutory-appeal rule. There is a small class of cases—including this one—in which a second appeal would address a qualified immunity defense that is legally distinct from the defense raised in the first appeal, and that could not have been raised in that appeal. The courts of appeals have jurisdiction over second appeals in such circumstances, and the Ninth Circuit's one-appeal rule barring such appeals thus conflicts with *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), and *Johnson* v. *Jones*, *supra*. Although no more than one appeal is and should be the norm in qualified immunity cases, this case illustrates why the court of appeals' rule is too rigid and should be rejected.

The practical need for a one-appeal rule is also questionable. The circuits that have adopted such

rules have done so based on a judgment that multiple appeals impose burdens of expense and delay on civil rights plaintiffs that outweigh the benefits to public officials seeking to enforce their qualified immunity defenses under *Mitchell* v. *Forsyth*, *supra*. Yet, in practice, very few qualified immunity cases actually involve second appeals, and even fewer second appeals can be expected after this Court's recent decision in *Johnson* v. *Jones*, *supra*. More flexible, case-specific techniques of docket management are available and adequate to ensure that unwarranted second appeals are quickly identified and disposed of, while meritorious second appeals are allowed to proceed.

ARGUMENT

I. PETITIONER'S SECOND APPEAL RAISED A PURELY LEGAL QUALIFIED IMMUNITY QUESTION APPROPRIATE FOR INTERLOCUTORY REVIEW UNDER *JOHNSON* V. *JONES*

The court of appeals had jurisdiction over the second interlocutory appeal in this case, and only the one-appeal rule prevented the court from exercising it. The question on which petitioner sought to appeal was precisely the type of qualified immunity issue that this Court has held is subject to interlocutory appellate review: whether "certain given facts showed a violation of 'clearly established' law." *Johnson* v. *Jones*, 115 S. Ct. 2151, 2155 (citing *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985)). Specifically, petitioner's second appeal would have addressed respondent's claims that he had a constitutionally protected property interest in his employment as managing officer of Pioneer Savings

& Loan, and that petitioner deprived him of that interest without procedural due process by sending the May 8, 1986, letter declining to approve respondent for that position. The "given facts" upon which the qualified immunity defense to that claim rests are that, under federal regulations generally governing new savings institutions as well as a Federal Home Loan Bank Board resolution directed specifically at Pioneer, respondent had no right to serve as managing officer of Pioneer without regulatory approval.

Petitioner asserted in the district court, and sought to pursue on appeal, the purely legal qualified immunity defense that the law is, at best, unclear as to whether an employee can have a property right in a job that, by law, is conditioned on regulatory approval. A property interest cannot arise from "a mere subjective 'expectancy,'" but requires a "legitimate claim of entitlement to continued employment absent 'sufficient cause.'" *Perry* v. *Sindermann*, 408 U.S. 593, 602-603 (1972). Petitioner sought to contend that, in a context such as this one, where employment in a particular position is expressly conditioned from the outset on regulatory approval, no "claim of entitlement" to the job, and thus no clearly established procedural due process right, exists. Whether petitioner is correct as to that pure question of law is an issue over which, in the absence of a one-appeal rule, the court of appeals had interlocutory appellate jurisdiction.[7]

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[7] The factual disputes that respondent identified below are not material to whether petitioner is entitled to qualified immunity. For example, respondent alleged in his declaration in district court:

The wording of the district court's order might, however, be viewed as an independent obstacle to interlocutory appellate review in light of *Johnson* v. *Jones*, *supra*. The district court denied the motion for summary judgment, in which petitioner raised his qualified immunity defense, by stating, without further explanation, that "[m]aterial issues of fact remain as to defendant Behrens on the *Bivens* claims." Pet. App. 5a. The order appears on its face to "resolve[] a *fact*-related dispute about the pretrial record, namely whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." *Johnson*, 115 S. Ct. at 2153. *Johnson* held that "defendants cannot immediately appeal this kind of fact-related district court determination." *Ibid.* Among the defenses petitioner has raised in this case, however, is a qualified immunity defense that does not turn on the resolution of any factual disputes. Indeed, respondent himself asserted in his brief in opposition to the petition for certiorari that, in this case, "the facts are not in dispute." Resp. Br. 13.

> I was told in April 1986, one month before the 'Behrens Directive,' that the federal regulators were not pursuing me and that they would not jeopardize my employment until the Beverly Hills Savings investigation had been completed and I had been found liable for some wrongdoing. I was told this by both Ralph Christie and Ann Sobel, senior attorneys for the Bank Board.

Pelletier Decl. (6/12/89) at 3 (¶ 7). Petitioner is entitled on appeal to argue that, even assuming that a jury would credit that allegation, the law was at best unclear whether, under those circumstances, respondent could have a property right in the managing officer position. That argument is a purely legal one, not contingent on resolution of any disputed issues of fact.

In the presence of a district court order rejecting petitioner's qualified immunity defense with a one-sentence reference to "[m]aterial issues of fact," petitioner's effort to pursue on appeal a purely legal qualified immunity defense presents a problem closely related to one the *Johnson* Court addressed. The Court there noted the possibility that "[d]istrict judges may simply deny summary judgment motions without indicating their reasons for doing so," thus leaving unspecified what set of facts should be taken as true in answering the purely legal question about clearly established law. 115 S. Ct. at 2159. In that situation, the Court acknowledged, "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the non-moving party, likely assumed." *Ibid.* The Court thus sought to ensure that terse district court orders not insulate otherwise-appealable qualified immunity questions from interlocutory review. This case gives the Court the opportunity to ensure that a district court decision not lead to the same result by stating as a summary conclusion, without justification in the record, that "material issues of fact remain" precluding a decision regarding qualified immunity. Although the court of appeals did not have an opportunity to address the potential applicability of *Johnson* here, that court is in no better position than is this Court to do so now. Because this case properly would have been in the court of appeals but for the one-appeal rule, this Court should review the decision to adopt that rule.

II. THE ONE-INTERLOCUTORY-APPEAL RULE SHOULD BE REJECTED

A. The one-appeal rule is contrary to *Cohen* v. *Beneficial Indus. Loan Corp.* and *Mitchell* v. *Forsyth*

A categorical one-appeal rule is inconsistent with the final-order doctrine of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), as it applies to qualified immunity claims under *Mitchell* and *Johnson*. A court of appeals that has jurisdiction under 28 U.S.C. 1291, as *Cohen* interpreted that statute, lacks the authority to fashion a rule that contracts its own jurisdiction. Because the one-appeal rule contracts that jurisdiction in some situations, it is invalid.

A trial-court order is appealable under the *Cohen* test if it "[1] conclusively determine[s] the disputed question, [2] resolve[s] an important issue completely separate from the merits of the action, and [3] [is] effectively unreviewable on appeal from a final judgment." *Johnson*, 115 S. Ct. at 2155 (quoting *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 688 (1993), quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). See *Cohen*, 337 U.S. at 546. *Mitchell* held that the three parts of the *Cohen* test are satisfied by interlocutory orders denying qualified immunity defenses. 472 U.S. at 525-528.

Qualified immunity orders "easily meet[]" the first part, because such immunity not only protects defendant officials from liability for damages, but is also an "immunity from suit." *Id.* at 526-527. When there is "nothing in the subsequent course of the proceeding in the district court that can alter the court's conclusion that the defendant is not immune,"

denial of qualified immunity "finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations." *Ibid.* An order denying qualified immunity also meets the second part of *Cohen*: "[A] claim of immunity is conceptually distinct from the merits of the plaintiff's claim," *ibid.*, because it addresses "the purely legal issue what law was 'clearly established,'" that "can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." *Johnson*, 115 S. Ct at 2156 (quoting *Mitchell*, 472 U.S. at 530). Finally, a denial of qualified immunity is "effectively unreviewable" after final judgment because, to the extent that the immunity protects a right not to stand trial, that right is irrevocably lost once trial takes place. *Mitchell*, 472 U.S. at 525-526.

The court of appeals viewed its one-appeal rule as consistent with *Mitchell* because "[i]f the defendant's entitlement to qualified immunity is truly ascertainable as a matter of law * * * that fact should not require more than one judiciously timed appeal," and because a defendant official "may not demand repeated appellate consideration of a claim of qualified immunity that the district court has repeatedly rejected." Pet. App. 19a. That reasoning, however, does not support application of a one-appeal rule in this case. Instead, it reflects the court of appeals' erroneous assumption that a qualified immunity defense to the job-termination claim that was the subject of petitioner's 1994 appeal would present the same legal question raised by the qualified immunity defense to the post-termination conspiracy claim. If a second appeal is sought on the same theory that a court of appeals has already rejected in an earlier appeal, that could indeed

warrant dismissal of the second appeal as frivolous under the doctrine of law in this case. But the risk of such abuse of the appellate process does not justify the adoption of a categorical one-appeal rule to bar a valid and legally distinct second appeal.

The First Circuit in *Kaiter* v. *Town of Boxford*, 836 F.2d 704 (1988), also sought to derive support for its announcement of a one-appeal rule from *Mitchell* and *Cohen*.[8] *Kaiter* held that the first part of *Cohen*, requiring a conclusive determination, is not met where steps remain to be taken "in the subsequent course of the proceedings [in the district court] that can alter the court's conclusion that the defendant is not immune." *Id.* at 707. *Kaiter* involved retaliation claims against a local building inspector who appealed from an order denying him absolute immunity, but who told the court of appeals that, if his appeal failed, he would assert qualified immunity in a subsequent motion for summary judgment. *Id.* at 705-706. The court of appeals held that defendant's decision "reserving for a later *pretrial* proceeding his claim to qualified immunity" was "fatal to his current appeal." *Id.* at 706. The court viewed absolute and qualified immunity as two aspects of a single doctrine aimed at shielding public officials from interference with their duties, and concluded that one pretrial appeal—but only one—is needed to make that shield effective. *Id.* at 707. A defendant official may bring all his immunity defenses in a motion to dismiss and appeal

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[8] The Seventh Circuit in *Abel*, 904 F.2d at 396, implicitly acknowledged that its one-appeal rule might be contrary to *Mitchell*, and instead relied primarily on the burden that appeals "on the authority of *Mitchell*" would impose on plaintiffs. See page 23, *infra*.

immediately if that motion is denied, but if separate motions to dismiss and for summary judgment are planned, "both motions should be resolved prior to any interlocutory appeal," because the court "will not entertain an interlocutory appeal on one of the claims while the other is reserved for later pretrial proceedings." *Id.* at 708.

Kaiter's justification of the one-appeal rule under *Cohen* and *Mitchell* fails to take account of special circumstances, not present in *Kaiter*, that are present in this case. This case involves two separate claims based on different legal theories. Those different legal theories call for separate and different immunity defenses, only one of which could be adjudicated in the initial, 1990 interlocutory appeal because, at that time, the other claim had been dismissed as time-barred. In addition, in this case, unlike *Kaiter*, the fact that petitioner would have reason to assert a second immunity defense in later proceedings in the district court (and on appeal) was not evident when he took his first appeal. The need for a second appeal to address whether that separate claim was based on clearly established law became apparent only after the timeliness of that claim was reconsidered in 1994 and the claim was revived by the district court. In sum, *Kaiter*'s finality analysis, although perhaps applicable to the facts of that case, would not have justified applying a one-appeal rule to postpone and consolidate the first appeal in this case with the second one, because no further immunity proceedings in the district court were anticipated with respect to either claim at the time of that first appeal. And the second appeal in this case was proper under *Cohen* and *Mitchell* because it dealt with a conclusive determination of a qualified immunity

question that could not have been decided in the first appeal.

Circumstances like these, although rare, are not *sui generis*. Rather, this case is illustrative of the narrow class of cases in which second interlocutory appeals are warranted and should be permitted. In addition to the circumstances presented in this case, a second appeal may be needed—and be available consistent with *Cohen*—when, under liberal pleading and amendment rules, plaintiffs shift legal theories substantially during litigation, thus making different qualified immunity defenses appropriate.

For example, suppose that a prisoner alleges that she was subjected to retaliatory discipline in violation of the First Amendment. The defendant warden then moves to dismiss on the ground that the plaintiff admitted in her complaint that she violated prison rules and, the warden asserts, the law is unclear as to whether a retaliation claim will lie where the violation triggering the allegedly retaliatory discipline actually did take place. Assume that the district court might deny such a qualified immunity motion, and that the court of appeals affirms. The case then proceeds to discovery. If discovery were to reveal no evidentiary basis for the retaliation claim, but did support a claim that the discipline was imposed without prior notice and a hearing, the prisoner might recast her claim as a due process violation. If the law supporting that *revised* claim were to be unclear, there is no principle consistent with the *Cohen/Mitchell* analysis on which the defendant warden should be denied an opportunity to raise a qualified immunity defense and, if necessary, to appeal its denial before trial. Like the case now before the court, this example involves (1) two

separate and distinct legal claims of qualified immunity, and (2) circumstances in which the defendant would not anticipate, at the time of the first appeal, that a second appeal would be needed. Where those factors are present, two appeals are warranted under *Cohen*. A categorical one-appeal rule therefore should be rejected.[9]

B. A practical need for a one-appeal rule has not been demonstrated

1. *Defendant officials rarely take multiple appeals.* The principal rationale for a one-appeal rule is that multiple interlocutory appeals would add

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[9] A one-appeal rule may also be inappropriate in cases involving an immunity defense (absolute or qualified) that is susceptible of disposition on the pleadings alone, coupled with a potential qualified-immunity defense (to the same or a separate claim) the viability of which is contingent on the results of discovery. Denial of a motion to dismiss based on absolute immunity is immediately appealable under *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), just as denial of such a motion based on qualified immunity is immediately appealable under *Mitchell*, and such appeals should be promptly taken consistent with the principle that immunity questions generally "should be resolved at the earliest possible stage of a litigation." *Anderson* v. *Creighton*, 483 U.S. 635, 646 n.6 (1987). A second immunity defense, however, may not be "ripe" until some discovery is had. *Ibid.* ("discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved"). Application of a one-appeal rule in such a situation could require that appeal on the first immunity issue be delayed until discovery is complete. Yet, if an immediate pre-discovery appeal could obviate the need for further litigation on at least one claim (or perhaps the whole case), a requirement that the defendant official wait because of the uncertain prospect that a second appeal might be needed would weaken the very immunity protection that *Harlow* and *Mitchell* sought to provide.

substantially to the delay and expense of litigating civil rights claims. See Pet. App. 18a. The Ninth Circuit in *Nelson* v. *Silverman*, 999 F.2d 417, 419 (1993), explained that "[i]t was precisely to shield plaintiffs from repeatedly having to shoulder [the burdens of appellate litigation] that we concluded in *Pelletier* that a defendant may bring only one pre-trial appeal of the denial of a grant of qualified immunity." The Seventh Circuit in *Abel* v. *Miller*, 904 F.2d 394, 396 (1990), similarly cautioned:

> Unless courts of appeals are careful, appeals on the authority of *Mitchell* could ossify civil rights litigation. Defendants may defeat just claims by making suit unbearably expensive or indefinitely putting off the trial. A sequence of pre-trial appeals not only delays the resolution but increases the plaintiffs' costs, so that some will abandon their cases even though they may be entitled to prevail.

See also *Kaiter*, 836 F.2d at 707 ("there is no need to burden the appellate system and prolong the pretrial process with multiple interlocutory appeals").[10]

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[10] A related reason the courts have cited for a one-appeal rule is to deprive defendant officials of "potent weapons for delay." *Abel*, 904 F.2d at 397; see Pet. App. 18a (routine, baseless qualified immunity appeals "evince[] a flagrant disregard of the Court's intent in creating the qualified immunity doctrine"). It cannot, however, simply be assumed that officials interpose baseless second interlocutory appeals for improper purposes. When there is reason to believe in a particular case that a defendant official has done so, the court may, after giving notice and an opportunity to respond, impose sanctions under Federal Rule of Appellate Procedure 38. Such targeted sanctions, rather than wholesale elimination of the opportunity for valid as well as baseless second appeals, is the

Multiple qualified immunity appeals are not, in practice, common, however, and they are likely to become even less frequent in light of *Johnson* v. *Jones*, *supra*. The circuits that have adopted one-appeal rules have themselves acknowledged that there are very few cases in which defendant officials have actually used opportunities to take repeated appeals. See *Abel*, 904 F.2d at 396 ("Paucity of precedent on this question [of the permissibility of second appeals] must reflect the forbearance of public officials rather than the lack of opportunity."); *Kaiter*, 836 F.2d at 706 ("[I]n every case we have found which permitted interlocutory review of an immunity ruling, the defendant's entire claim to immunity was raised in a single proceeding"). Indeed, none of the cases cited in the petition as allowing multiple appeals in fact involved more than one appeal. See Pet. 8.[11]

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appropriate response to abuses. See *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 720 (10th Cir. 1988) ("That some interlocutory appeals may be frivolous * * * does not affect whether we have jurisdiction. Those appellants or their counsel can be sanctioned for taking a frivolous appeal.").

[11] *Kulwicki* v. *Dawson*, 969 F.2d 1454, 1457 n.2, 1460 n.5 (3d Cir. 1992), involved neither qualified immunity nor any issue of repeated appeals, but a routine exercise of jurisdiction over an absolute immunity appeal, with the court observing that *Mitchell* contemplated immunity appeals at "either or both" the motion to dismiss or motion for summary judgment stage. *Murphy* v. *Morris*, 849 F.2d 1101, 1103-1104 (8th Cir. 1988), rejected the contention that a one-appeal rule required the defendant official to delay an initial appeal asserting absolute immunity until her qualified immunity defense was also rejected and ripe for appeal. *Kennedy* v. *City of Cleveland*, 797 F.2d 297, 299-300 (6th Cir. 1986), affirmed a district court's denial of supplemental motions for summary judgment

Not only have there been very few reported cases involving multiple appeals, but this Court's decision last Term in *Johnson* promises to restrict further the class of cases in which a second appeal is potentially available. Several circuits before *Johnson* permitted appeals to assert "evidence insufficiency" claims, see 115 S. Ct. at 2154 (citing cases), and those claims were natural candidates for second appeals following courts of appeals' initial rejections of qualified immunity defenses at the motion to dismiss stage. In eliminating the opportunity for appeals asserting evidentiary insufficiency, *Johnson* substantially diminished the bases for concern about both routine second appeals and multiple, fact-oriented

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asserting qualified immunity on the ground that the issues they raised had already been considered. In its discussion of the importance of the courts' managerial powers over qualified immunity cases, the court observed that civil rights actions "may be interrupted by not one but two interlocutory appeals" asserting qualified immunity. *English* v. *Dyke*, 23 F.3d 1086 (6th Cir. 1994), reversed an order holding that failure to raise a qualified immunity defense in a motion to dismiss waived it, and reiterated *Kennedy*'s statement that a qualified immunity defense can be raised (and, if denied, appealed) at various stages of litigation. *Sinclair* v. *Schriber*, 834 F.2d 103 (6th Cir. 1987), held that denial of a motion for summary judgment on qualified immunity grounds without prejudice under Federal Rule of Civil Procedure 56(f) is not appealable, notwithstanding *Kennedy*'s apparent tolerance of repeated appeals, because such an order lacks the requisite finality under *Cohen*.

Moreover, two of the four cases (see Pet. 8) imposing a one-appeal limitation (this case and *Kaiter*) did so before any second appeal was filed, and another case did not involve a full-fledged initial appeal, but only a notice of appeal that the official withdrew. Only *Abel* actually reached the stage of a second appeal on a qualified immunity question.

appeals.[12] After *Johnson*, very few cases remain plausible candidates for a second interlocutory appeal.

2. *Other procedures better serve the same purpose.* The federal courts have sufficient tools at their disposal, without a one-appeal rule, to manage the potential burdens created by unjustified multiple interlocutory qualified immunity appeals. Appellees who believe that a second appeal is unwarranted—for example, because it is barred by the law of the case as announced in an earlier appeal, or because it is a fact-bound appeal barred by *Johnson*—may move to dismiss an appeal before briefing on the merits is had. See Fed. R. App. P. 27. The filing and disposition of such a motion will generally occur sooner and impose less burden on the litigants and the courts than full briefing and decision on the merits. Alternatively, the appellate courts might use their rulemaking powers, see Fed. R. App. P. 47, to require that appellants seeking to take second appeals first move for leave to do so. Although no court of appeals to our knowledge has yet adopted such a procedure, such a rule might encourage greater reflection and restraint on the part of the potential appellant, and would ensure that the court of appeals has an early opportunity to consider whether the issue sought to

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[12] Counsel for petitioner in *Johnson* conceded that "theoretically it would be possible in every case" for a public official to appeal the denial of a motion for summary judgment on grounds of "evidentiary sufficiency." Oral Arg. Tr. 7-8. And one concern prompting the one-appeal rule was that a defendant official "could continue indefinitely" in a process of adducing additional evidence, moving repeatedly for summary judgment on an enlarged record, and appealing each denial. *Abel*, 904 F.2d at 396.

be raised actually falls within the narrow class of permissible second appeals.

Existing rules in several circuits authorize district courts to certify to the court of appeals that a qualified immunity appeal is frivolous. See, *e.g.*, *Apostol* v. *Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989) (Easterbrook, J.) (district court may certify in writing that immunity appeal is frivolous); *Yates* v. *City of Cleveland*, 941 F.2d 444, 448-449 (6th Cir. 1991) (accord); *Stewart* v. *Donges*, 915 F.2d 572, 576-577 (10th Cir. 1990) (accord); *Chuman* v. *Wright*, 960 F.2d 104-105 (9th Cir. 1992) (accord). That procedure (which was used in this case) minimizes disruption at the trial level by allowing the district court to retain jurisdiction and to require the parties to continue with the district court proceedings while the appeal is pending. It also may facilitate summary dispositions of baseless appeals by communicating to the court of appeals the strength of the district court's conviction that its order was correct or not appealable. And, as this Court has pointed out, frivolous interlocutory appeals "may be weeded out by summary procedures." *Richardson* v. *United States*, 468 U.S. 317, 322 (1984). In order to ameliorate potentially prejudicial delays caused by multiple appeals, courts can also expedite them, so that obvious district court errors can promptly be corrected by summary reversal.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further consideration of the merits of petitioner's qualified immunity defense.

Respectfully submitted.

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